Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 82 - 970

JOHN LaGUARDIA,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 82-970

JOHN LaGUARDIA, Petitioner	:	
vs.	:	No. 82-970
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

AND NOW, January 3, 1983, comes the Commonwealth of Pennsylvania by and through the District Attorney's Office of Mercer County, Pennsylvania, to oppose John LaGuardia's petition for writ of certiorari for the following reasons:

ARGUMENT

Petitioner argues that he was denied his Sixth Amendment Right to a fair and

impartial jury by the prosecution's closing argument. Petitioner further claims that he was denied his Sixth Amendment right to produce witnesses on his behalf by the trial court's refusal to grant a delay. Finally, petitioner claims that the trial court shifted the burden of proof from the Commonwealth to the petitioner by commenting in the presence of the jury that petitioner could call his father as a witness to prove ownership of certain seized guns.

It is the Commonwealth's position that the United States Supreme Court should deny certiorari in this matter because:

1. The Pennsylvania courts properly dissolved all of the above issues against the petitioner.

The first Pennsylvania court to hear petitioner's complaints was the Honorable Albert E. Acker, Judge of the Mercer County, Pennsylvania, Court of Common Pleas. Petitioner has attached a copy of Judge Acker's opinion, which is Appendix "A".

Petitioner subsequently appealed to the Superior Court of Pennsylvania raising the identical issues and the Superior Court on July 30, 1982, affirmed the judgment of the sentence. Petitioner in his petition for writ of certiorari has attached a copy of the memorandum opinion of the Superior Court of Pennsylvania as Appendix "B".

Finally, the Supreme Court of Pennsylvania declined to review the Superior Court's decision by denying petitioner's petition for allowance of appeal on

November 5, 1982, as set forth in petitioner's brief as Appendix "C".

The petitioner, John LaGuardia, was convicted after a jury trial of the following offenses: aggravated assault on the person of Mercer County Deputy Sheriff Dana Frankenburg based on causation of bodily injury with a firearm to the officer while making an arrest,[1] recklessly endangering Mercer County Narcotics Officer Gary Lenzi with an automobile or firearm,[2] possession of cocaine with intent to deliver,[3] and criminal conspiracy to possess cocaine with intent to deliver.[4] Petitioner was

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1 18 Pa. C.S. §2702.
2 18 Pa. C.S. §2705.
3 35 Pa. C.S. §780-113 (a) (30).
4 18 Pa. C.S. §903.

acquitted of twelve other offenses.[5] All charges arose from a series of events occurring on or about March 5, 1978.

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5 The petitioner was found not guilty of criminal conspiracy as to aggravated assault upon Dana Frankenburg while not attempting to make a lawful arrest, aggravated assault upon Dana Frankenburg either by firearms or by automobile while not attempting to make a lawful arrest, criminal conspiracy as to aggravated assault upon Dana Frankenburg while attempting to make a lawful arrest, aggravated assault upon Dana Frankenburg not causing bodily injury by either firearm or automobile while attempting to make a lawful arrest, conspiracy as to murder in the first degree of Dana Frankenburg by use of a gun, criminal conspiracy as to recklessly endangering as to Gary Lenzi by firearms or automobile, criminal conspiracy of aggravated assault upon Gary Lenzi causing bodily injury while attempting to make a lawful arrest, aggravated assault upon Gary Lenzi causing bodily injury by firearms only while attempting to make a lawful arrest, criminal conspiracy as to aggravated assault upon Gary Lenzi either by firearms or automobile while not attempting to make a lawful arrest, aggravated assault upon Gary Lenzi either by firearms or automobile while not attempting to make a lawful arrest, criminal conspiracy as to aggravated assault upon Gary Lenzi while attemtping to make a lawful arrest, aggravated assault upon Gary Lenzi by either firearms or automobile while artempting to make a lawful arrest.

Prior to March 5, 1978, William Frank, an informant employed by the Mercer County Narcotics Unit, met with petitioner and subsequently spoke to him by telephone. During the personal meeting, the informant was disguised and identified himself only as "Willy." (N.T. 320, 321). The informant had never previously met nor seen petitioner. (N.T. 319). As a result of these conferences a drug transaction was set up for 8:00 p.m., March 5, 1978, in the parking lot of the Sheraton Inn, West Middlesex, PA. The petitioner and an associate were to arrive at the Sheraton Inn parking lot at the appointed date and time with approximately two pounds of cocaine which was to be sold to the informant for $35,000.00. The informant obtained such a sum to be used as flash money. (N.T. 334).

Members of the Mercer County Narcotics Unit were present at various vantage points allowing them to surveil the Sheraton Inn parking lot. The petitioner and an associate, as previously noted were to arrive at the parking lot with the cocaine. Mr. William Frank and his associate, James Sutley, narcotics unit informers were to be at the scene. Mr. Sutley was to show the petitioner the flash money, at which time petitioner would provide cocaine to be tested by Mr. Frank in a room in the Sheraton Inn. If the cocaine were of satisfactory quality and purity, the petitioner was to deliver the full two pounds in exchange for $35,000.00. This was the plan as agreed between petitioner and Mr. Frank. (N.T. 332, 333).

In reality, the Narcotics Unit officers and the informants had agreed that Mr. Sutley would enter petitioner's vehicle, show him the money, and have petitioner produce some or all of the cocaine. When Mr. Sutley saw the cocaine, he was to signal the narcotics officers by lighting a cigarette, at which time they would move in on the vehicle and arrest petitioner and his associate. (N.T. 125-129,339).

Mr. Sutley did in fact enter petitioner's vehicle. Petitioner was driving, Sutley on the front passenger seat, and petitioner's associate Patrick Harbison in the back seat. The foregoing events occurred, with the cocaine being produced by petitioner. (N.T. 496-503).

Officers Dana Frankenburg and Gary Lenzi advanced on the vehicle, displaying identification and announcing themselves as police officers. Officer Kenneth Torrence approached from the rear. (N.T. 136). As the officers neared petitioner's vehicle, both petitioner and Harbison produced handguns. (N.T. 505). The vehicle's engine was started and it began to move slowly.

At this point, Officer Lenzi jumped onto the hood of petitioner's vehicle, placing his identification badge directly in front of the windshield. The vehicle accelerated, knocking Officer Lenzi to the ground. (N.T. 137, 138). Almost simultaneously, shots were fired from within the petitioner's auto. One shot struck Officer Frankenburg, grazing his cheek. The shot was fired from the vicinity of

the front driver's seat. (N.T. 563, 566). The officers fired back at petitioner's vehicle, attempting unsuccessfully to disable it.

A high speed chase ensued in which petitioner was pursued by the police for 10.3 miles at speeds exceeding 85 miles per hour. (N.T. 151, 192). In addition to the narcotics officers, police units from three localities, the Pennsylvania State Police, the Ohio State Patrol and the Trumbull County Ohio Sheriff's Department took part in the chase which ended shortly after petitioner crossed the Ohio border. Petitioner and Patrick Harbison were arrested at that time. A quantity of cocaine along with drug related paraphernalia were recovered from the chase route and petitioner's vehicle.

Extradition proceedings were immediately commenced against petitioner. However, he was not returned to Pennsylvania until January 19, 1979, after his arrest by Boardman, Ohio police on unrelated charges. Several extradition hearings were held between March 5, 1978, and January 19, 1979, resulting in petitioner's bond being revoked and his extradition ordered.

A preliminary hearing was held in the instant case on February 2, 1979. William Frank, the narcotics unit informant instrumental in setting up the "buy bust" did not testify at said hearing. He was not identified at the hearing. Frank had previously been promised anonymity. (N.T. 337, 479).

Prior to petitioner's trial, he attempted to retain Attorney Herman Rodgers as counsel. Mr. Rodgers was removed from the case on motion of the Commonwealth because he had previously represented William Frank in an unrelated drug case. In a memorandum filed in opposition to the Commonwealth's motion, Mr. Rodgers referred to Mr. Frank as "Willie Frank."

At no time prior to trial did the Commonwealth refer to Mr. Frank as "Willy." During the trial, counsel for petitioner referred to Mr. Frank as "Willy" on two occasions during cross-examination of Officer Lenzi. (N.T. 216, 218). After said cross-examination Mr. Frank revealed that he had used the pseudonym "Willy" when dealing with petitioner.

As noted above, petitioner was convicted by a jury of four charges. Timely post-trial motions were filed and denied by the trial court. The instant appeal follows.

It is the Commonwealth's position that the trial court correctly permitted the prosecuting attorney to argue that evidence of guilt could be inferred from a question asked by defense counsel and therefore there is no Sixth Amendment violation.

As previously noted the instant case arose from what may be characterized as a "buy bust" narcotics transaction involving petitioner and the Mercer County Narcotics Unit.

William Frank, an informant employed by the police, testified that prior to March 5, 1978, he met with petitioner, with whom he was previously unacquainted for the purpose of arranging a sale of narcotics from petitioner to undercover representatives of the police. Mr. Frank testified that he disguised himself during the meeting and used the pseudonym "Willy." (N.T. 320, 321). Mr. Frank further testified that he did not testify at the preliminary hearing in the instant case, nor did he expect to testify in any proceeding. (N.T. 337, 479).

An in trial review of the preliminary hearing transcript, which has been made a part of the record in the instant case, by the lower court confirmed that Mr. Frank

did not testify at said hearing and was not identified or referred to by name or as "Willy" during its course.

Prior to trial, the Commonwealth filed a motion to require the withdrawal of Attorney Herman Rodgers as petitioner's counsel. The motion was predicated upon Attorney Rodgers' prior representation of Mr. Frank in an unrelated drug charge. Attorney Rodgers opposed the motion and filed a memorandum in support of his position referring to Mr. Fank as "Willie Frank."

Attorneys William Panella and Carmen Policy represented petitioner at trial.

During the course of Attorney Policy's cross-examination of Officer Gary Lenzi, the attorney twice referred to Mr. Frank

as "Willy" leading to the following exchange which followed the first reference:

> "THE COURT: Could we correct the name of that. I believe this man's name is Billy or William. I don't think that it's Willy unless he's willing to accept that. That may be another name for him but in this trial he's only referred to by those two names.
> "Q. As Billy. Is he called Willy Frank or Billy Frank or William Frank?
> "A. It's William or Bill Frank, Billy." (N.T. 216).

To that point, Mr. Frank, as noted by the court, had not been referred to as "Willy." His use of the pseudonym "Willy" had not been revealed by the Commonwealth.

Petitioner later testified on his own behalf. He denied ever meeting with Mr. Frank to set up a drug transaction, denied going to the Sheraton Inn on March

5, 1978, to consummate such a transaction, and denied shooting at the arresting officers.

In her closing remarks, the prosecuting attorney argued in part as follows:

> "He tells you that as a result of a telephone conversation he had with this defendant, he met the defendant at Howard Johnson's Motor Lodge on Route 19 south of Mercer. And ladies and gentlemen, I submit to you that one of the most crucial items of evidence that you would have heard in this courtroom in the two weeks came through Mr. Frank's testimony at this point. If you may recall, when he was being cross examined, I objected to his being referred to as Willie. You will recall, I'm sure, that the Court instructed counsel concerning that matter and told him he was to address him as Mr. Frank, and that his name was William Frank or Billy Frank. You will recall, I'm sure, that Chief Lenzi at all times when he referred to Mr.

> Frank referred to him as Billy Frank. But defense counsel cross-examined him and referred to him as Willie. Now, I submit to you that Mr. Frank subsequently divulged that when he met this defendant, and when he was playing the part and not giving his last name, although he had the defendant's last name, he told the defendant his name was Willie in the Howard Johnson's parking lot on the night they met and first discussed this transaction. There was no testimony of any Willie being used at any preliminary hearing. To the contrary, Chief Lenzi told you he was attempting to at that time still keep him as a confidential informant and not divulging his name."

Prosecuting counsel, in effect, asked the jury to infer that defense counsel could only have learned of the name "Willy" from petitioner, thus corroborating Mr. Frank's testimony about his meeting with petitioner.

Defense counsel objected to the inference, stating that he had encountered

the name "Willy" in the context of a prior proceeding, most probably the preliminary hearing. The court overruled the objection.

Petitioner now contends that the prosecutor's argument was not supported by the evidence and mandates award of a new trial.

As noted by the lower court, a prosecutor must limit statements to facts and evidence and legitimate inferences that can be drawn therefrom. (lower court opinion, page 14) citing Commonwealth v. Harvell, 458 Pa. 406, 327 A.2d 27 (1974); Commonwealth v. Revty, 448 Pa. 512, 295 A.2d 300 (1972); Commonwealth v. Hill, 479 Pa. 346, 388 A.2d 689 (1978); Commonwealth v. Long, __Pa. Super. __, 392 A.2d 810 (1978) and the American

Bar Association Standards relating to the Prosecution Function §5.8 (a) and §5.9.

In the case at bar, it is submitted that the prosecutor's remarks constitute a reasonable inference from the record. Even if prior counsel referred to Mr. Frank as "Willie Frank," said reference occurred before Mr. Frank's use of the pseudonym "Willy" was made known by the Commonwealth. Thus, it may still be reasonably inferred that the name "Willy" or "Willie" was supplied to counsel by petitioner, who alone, aside from agents of the Commonwealth knew Mr. Frank as "Willy" or "Willie."

Assuming arguendo that the prosecutor's remarks constituted error, it is further submitted that the error was harmless and does not warrant award of a

new trial. As noted in Commonwealth v. Story, __Pa.__, 383 A.2d 155, 162 (1978) trial error is harmless if the appellate court can so conclude beyond a reasonable doubt. It is submitted in the instant case that the properly admitted evidence of guilt is so overwhelming as to render any error harmless.

As noted previously, Mr. Frank and Mr. Sutley both testified re the first meeting with petitioner. Mr. Frank testified as to subsequent telephone conversations setting the date, time, location, and purpose of the meeting. Petitioner appeared at the appointed location. Mr. Sutley testified that petitioner produced cocaine and a firearm and was driving his vehicle. Mr. Frankenburg testified that shots were fired from

the driver's position. Mr. Lenzi testified that the driver accelerated the car throwing him from the vehicle. Cocaine was recovered. Petitioner was captured while driving the vehicle after a high speed chase. The Commonwealth, in summary, presented testimony from which it can be inferred that petitioner appeared at a pre-arranged narcotics sale with narcotics for sale, shot at at least one officer, endangered another, and attempted to escape. Against the weight of such testimony, any error was harmless.

It is the Commonwealth's further position that the trial court correctly refused petitioner's request for a continuance for the purpose of securing an additional witness, and that the trial

court did not violate petitioner's Sixth Amendment right in so doing.

With reference to the above issue, the Commonwealth adopts the rationale of the trial court which is repeated below:

> "The testimony of the Commonwealth was that there was $35,000.00 in cash in the defendant's motor vehicle driven from the scene along with a hostage in a hail of bullets. The car was chased for approximately 10 miles throughout Pennsylvania before it got onto Interstate 80 and was eventually stopped going west just beyond the Pennsylvania-Ohio border in Ohio. Deputy Sheriff Anthony Beall, of Trumbull County, Ohio, received a radio message concerning this event. He proceeded toward the Pennsylvania border on Interstate 80 when he was dispatched directing him to the area. Upon arriving at the scene he found two men in handcuffs being placed in a marked Hermitage police department vehicle and two Mercer County Narcotics agents. After the defendants were taken in a police cruiser to jail, the deputy remained in the area of

the vehicle in order to secure it until a wrecker arrived. He noted bullet holes in the right front door of the passenger side. The windows were down. In examining the holes, he found a bag of money in the car. The money was in a brown bag similar to that in which groceries are held. The deputy looked into the bag and saw that there was 'a lot of money.' He rolled the bag back up, closed the door of the car and radioed that one of the packages that was being looked for was found. The other package was to have contained cocaine. He did not count the money. Two agents of the Narcotics Unit returned to the scene. The deputy took the money and turned it over to his lieutenant. This testimony was received on May 23rd, being the 7th trial day. The name, Lieutenant Whiteside, was disclosed early in cross-examination of the deputy during the morning of May 23rd. Following the completion of another witness and just prior to lunch of that date, Attorney Policy for the defense suggested that he had a possible or potential witness and he was going to have to run out and try to serve a subpoena. He did not disclose the name of the witness. He inquired

as to how much more time the Commonwealth would take to complete its case and requested permission to give an opening and start his testimony the following day. The Court indicated that it had never made it a practice to stop a case to let either the district attorney or the defense run after witnesses in that it felt it was a bad practice. There was no motion on that day of the 23rd of May, 1979.

"On the morning of May 23, 1979, shortly prior to the completion of testimony, counsel for the defendant approached the bench stating that they had learned for the first time, the day previous, that Lieutenant Whiteside was the person to whom the money had been delivered. Attorney Policy stated that he had found Lieutenant Whiteside the night before and talked to him at some length. He said another attorney, without naming him in Trumbull County, had talked to him that morning at length; that Whiteside indicated that he would not appear unless forced to do so by subpoena. An address was given and a phone number in Warren, Ohio, and his place of employment also being in that city in the State of Ohio. He was no

longer a full time employee of the Sheriff's department. Questioning whether this Court had the power to order him to appear, Attorney Policy requested the Court through the prosecutor's office to request the appearance of the witness either that afternoon or the following morning. Despite objection by the Commonwealth that it did not have the power to subpoena across the state line, the Court entered an Order directing the District Attorney to contact Lieutenant Leskovac who was the witness's superior officer while the witness was on the force to inform Whiteside his presence was required in Court the following morning at 9:30. The Court brought to counsel's attention that if the witness did not appear, counsel should not come back to the Court because of defense counsel's failure to exercise the proper procedure through the Interstate Rendition of Witnesses Act bring the witness into court. Neither side knew the name Lieutenant Whiteside until the previous day. At 1:55 p.m. of that same day, May 23, 1979, counsel for the defendant presented a petition to secure attendance of the witness. This is authorized under the Act of July 9, 1976, P.L.

586, No. 142, Section 2 [42 Pa. C. S.A. 5964]. The Court immediately entered the proposed order directing that Joseph Whiteside be taken into bustody and delivered to an officer of this State to assure his attendance on May 24, 1979 at 9:30 o'clock, a.m. The Clerk of this Court sent the certified copy of the petition and order on May 23, 1979 but it was not received by the Courts of Trumbull County until May 25, 1979. The verdict, however, was received at 1:15 a.m. of that day. At about 4:21 p.m., on Wednesday, May 23, 1979, the Court instructed the jury there was potentially one more witness for the defense who may or may not appear the following morning at 9:30 a.m. The jury was further instructed that despite that the Court was going to proceed with rebuttal testimony and complete all of that testimony that day except one witness. The witness to be called the next morning for the defense would be permitted to testify as well as any surrebuttal to be produced by the defense. The Commonwealth then called the witness, David Allen, the Chief of Detectives of the Austintown Police Department. The following morning, Whiteside failed to appear. The defense requested a continuance.

All the testimony with the exception of Whiteside had been received. The case was then in its eighth (8th) day. The Court refused the continuance. The closing arguments and the charge were given and the jury retired to deliberate.

"The grant or refusal of a continuance lies within the sound discretion of the trial court and its action will be reversed only when there is found to be an abuse of discretion. Commonwealth vs. Howard, 466 Pa. 445, 353 A.2d 438 (1976); Commonwealth vs. Simmons, 361 Pa. 391, 65 A.2d 353, cert. den. 70 Supreme Court 96, 338 U.S. 862, rehearing denied 70 Supreme Court 181, 338 U.S. 888 (1949). The rule has also been stated that an appellate court will not reverse a trial court's denial of a continuance without a palpable and prejudicial abuse of discretion. Commonwealth vs. Kishbach, 247 Pa. Super. Ct. 557, 373 A.2d 118 (1976). It has also been phrased that the denial of a request for continuance will not be granted unless it's so arbitrary that it violates due process. Commonwealth vs. Merritt, 227 Pa. Super. Ct. 257, 323 A.2d 875 (1974).

"In Commonwealth vs. Scott, 469 Pa. 258, 365 A.2d 140 (1976), it was held the grant of a continuance to secure a material witness is within

the lower court's discretion. It cited as authority Commonwealth vs. Smith, 442 Pa. 265, 275 A.2d 98 (1971) for the criteria to determine whether there has been a proper exercise of that discretion. Five factors are cited. One, the necessity of the witness to strengthen the defendant's case. Two, the essentiality of the witness to the defendant's defense. Three, the diligence exercised to procure his presence at trial. Four, the facts to which he could testify. Five, the likelihood that he could be produced at the next term of court. In Smith, supra, there was a reversal of the lower court in the refusal to grant the continuance. The Supreme Court noted particularly, however, that the defendant's sole defense was alibi and the desired witnesses were alibi witnesses. Therefore, it was obvious that the denial prevented the defendant from presenting his only defense. On the other hand, if the testimony desired is merely cumulative or available from another source, a continuance may properly be denied. Commonwealth vs. Howard, supra, wherein Franklin vs. South Carolina, 218 U.S. 161, 168, 30 Supreme Court 640, 643 (1910) is cited as authority, at page 447,

' "It is elementary that the matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law." '

"Although we have found no case which articulates a more restrictive rule for continuance during the course of a trial than pre-trial it is apparent that there are substantial additional elements for consideration. This is particularly true where a trial that has gone on for a number of days and there is a concern of the jurors becoming contaminated or forgetting previous testimony. As to the latter, if the continuance had been granted, it might well have required more than one day to have attempted to get Lieutenant Whiteside into Court. The case was approaching the weekend. It could have required the jury to wait from Thursday morning to Monday morning after 8 days of testimony and no other witness to be produced. Commonwealth vs. Drew, 190 Pa. Super. Ct. 478, 154 A.2d 285 (1959) is a case where a request was made for continuance during trial. The witness, although 10 feet away from

a drug transaction of a busy downtown street in Philadelphia, might have seen the transaction and therefore be a eyewitness, there was no testimony that he did see the transaction. In fact the Commonwealth's witness stated that he did not believe that the desired witness saw the transaction. Not being an eyewitness to the transaction, the Court held there was no abuse of discretion in refusing the continuance during the course of the trial to produce the witness. That trial had proceeded 4 days as opposed to the 8 days already consumed in the instant case. Even more important, the defendant does not contend that there was not a bag of money in the car. His basic story was that he had lent his car to his friend, Pat Harbison and on the day of this incident he was to receive his car back. Harbison called him on the afternoon of this event, being a Sunday, and asked if he could use his car a little longer, perhaps another day or two. Defendant said he wanted the car back that night. Harbison said then he would come over to the defendant's girlfriend's house to drop the car off. As the defendant was being taken back to his house, Harbison asked the defendant, '...if I could drive him up to Pennsylvania a second....'The

defendant admitted that in the back seat of the car there was a gym bag and a grocery bag and a square brown box. Upon arriving at the Sheraton in Pennsylvania, he said a person came out of the Sheraton and got into the car and asked Harbison, who was in the back seat, if he had the money.[7]

"The defendant testified that Harbison passed up the brown bag to the front seat and Sutley, the friend of the informant, opened it, took out the green money envelope, opened it and started leafing through the money. It came from a plastic bag and there was a 'lot of money there.'

"To now contend through Lieutenant Whiteside that the money was not turned over to him despite the testimony of the deputy sheriff who found it in the car and testified he gave it to Lieutenant Whiteside may establish the possibility of another crime but is not in contradiction of the testimony of the defendant that a lot of money was present in the car.

"7 This is absolutely contrary to the Commonwealth's position that William Frank produced the money which was passed in the presence of the undercover agents to William Sutley who took it into the car.

> It introduces a collateral issue which does not assist in determining the guilt of the defendant of the principal offenses of which he was connected.
>
> "HENCE, THIS COURT FINDS NO ERROR."

It is the Commonwealth's further position that the trial court's comments regarding availability of a witness was proper.

By way of summary, it was the Commonwealth's theory in this case that the petitioner was an experienced cocaine dealer who on the night in question drove to the Sheraton in Mercer County, Pennsylvania to sell cocaine. It is the Commonwealth's further contention that the petitioner pulled the gun at the Sheraton, shot at the police and took off in order to elude capture. Then on the other hand he maintained that he innocently was at the

Sheraton at the request of a friend and that he had nothing to do with the firearms nor drugs.

With that background in mind, it is noted that the petitioner had testified on cross-examination as follows at page 102 of Partial Transcript of Proceedings, (hereinafter referred to as P.T.T.):

> "A. ...I did not have a gun.
> * * *
> "Q. Did you not own a gun that night?
> "A. No, I didn't.
> "Q. Did you not possess a gun that night?
> "A. No, I didn't.
> "Q. Do you own or possess... did you own or possess a gun at that time?
> "A. No, I didn't.
> "Q. None at all?
> "A. None at all.
> "Q. You did not own or possess a gun on the night of March 5, 1978?
> "A. That is correct."

In rebuttal the Commonwealth called Detective Sergeant David Allen of the Austintown Police Department. Sgt. Allen testified that the home of the petitioner was searched the day after the arrest of the petitioner in this case. This arrest refers to the night of the incident then the search would have been the next day. (P.T.T. 162 et seq.) Sgt. Allen testified that he found 11 rifles and two (2) pistols in the apartment. (P.T.T. 164). Testimony further indicated that the apartment was shared by the appellant and his father. The purpose of this testimony was to impeach petitioner's story that he did not own or possess any guns at the time. The court in fact gave the following cautionary instruction:

> "THE COURT: I want to stop a minute and explain to the jury. The evidence you have just received

concerning the possession of guns is not for the purpose to show that there was anything illegal by the defendant in possessing those guns, rather, it's for the purpose as the Commonwealth proffered, or offered, to demonstrate to the jury that guns would have been available; handguns would have been available to the defendant had he desired to have a handgun when he came over into Pennsylvania. It's meant to show the availability of a gun to him, not that it's illegal for him to have that gun in the home in Ohio. I hasten to add that the contention is, that the property was being occupied by both the father and son. It is possible that the guns, in fact all of them, belonged to the father. It's possible that some of them belonged to the father and some to the son, and none of them belonged to the son at all. Those are possibilities. However, I felt that the evidence as rebuttal had sufficient import for a jury to be permitted to consider it under proper caution. You will recall the testimony of the defendant, as I remember, that he did not have any guns on the day that this occurred. The search was made the next morning, early. I think the officer is saying 1:30, 1:35, that early in the morning.

You will recieve that testimony for that purpose only. All right." (P.T.T. pp. 165-166).

Trial counsel objected to the testimony at a sidebar conference on the basis of relevancy. (P.T.T. p. 156). Now petitioner's new counsel is arguing that it was error to permit this testimony on the basis of the law regarding impeachment of collateral matters. Assuming for the sake of argument that it was error to permit the officer's testimony on the basis of impeachment of collateral matters, it is respectfully submitted that this issue is waived since it was not preserved by the trial counsel and that trial counsel did not object to the evidence being offered for this reason, but instead he objected solely on the grounds of relevancy. When the evidence is relevant it tends to establish some fact material

to the case or tends to make the fact at issue more or less probable. Commonwealth v. Davenport, 462 Pa. 543. We submit that the relevancy of this evidence goes to the credibility of the petitioner versus the prosecution witnesses. Here we have two stories; both mutually inconsistent, therefore, any light that could be shed on who was telling the truth is extremely relevant. Even arguendo if the court feels that the evidence was logically relevant but not legally relevant in that its probative value was outweighed by unfair prejudice which would result from its submission, we submit that no trial error existed since the admission did not prejudice the right of the petitioner to a fair trial. Commonwealth v. Fell, 453 Pa. 531. Therefore, it is respectfully submitted that the

court properly permitted the Commonwealth to impeach the petitioner.

Trial counsel for the petitioner then cross-examined Sgt. Allen. On cross-examination the petitioner's attorney asked the officer if at the time the guns were found, did petitioner's father claim ownership. (P.T.T. 170). The Commonwealth objected on the grounds of hearsay and this objection was sustained. The court stated as follows:

> "THE COURT: Yes, sustained. He is present in court, as I understand it, he is available to be called."

At that point counsel for the petitioner went on to continue his cross-examination. (P.T.T. 170). At no point in time did he object to the comment by the court and, therefore, it is waived. It is black letter

law in Pennsylvania that an objection must be timely. Learned defense counsel could have at that time objected on the grounds set forth in petitioner's brief and could have moved for a mistrial. His failure to have so moved, constitutes a waiver. Moreover it is submitted that the trial court properly charged the jury in this regard regarding witnesses who are equally available to either side. In that regard the court states as follows:

> "The rule is that if a witness is not called by a side whom the jury would normally expect them to be cooperative or friendly to, to support their position, that the jury may in fact assume that their testimony would be against that side. But, in order for that rule to apply, it must be shown that the witness was not equally available to both sides. I inform you in this case there is no evidence that

any witness was not equally available to both sides, and therefore, you may not use the rule of adverse inference against either side as to any witness who was not called or potential witness." (Court's charge, pp. 32-33).

Moreover at the conclusion of the charge there was no request for additional instruction to make specific reference to the petitioner's father or any other witness. As noted in Judge Acker's opinion from which we quote:

> "The test of prejudicial effect of a comment by a court is well set forth in Commonwealth vs. Anskate, 221 Pa. Super. Ct. 122, 289 A.2d 156 (1972), at pages 124-125,
>
> 'It must be determined from all the circumstances whether a remark has a prejudicial effect; there is no fixed rule applicable to every case. An accepted guide in determining prejudicial effect is that, if the remark may be said with fair assurance to have had but a slight effect upon the jury, if any at all, and one

> is not left in doubt that it had no substantial influence in the case, it will not vitiate an otherwise fair trial.' "

Therefore, the Commonwealth respectfully submits that the trial court's comment was not improper and even if it was improper it was not prejudicial.

The United States Supreme Court has stated that when a decision might have been either on a federal ground or a state ground and the state ground is sufficient to sustain a judgment, the United States Supreme Court will not review the federal ground on appeal as of right unless the state ground is too insubstantial or insufficient. Lamb Enterprises, Inc. v. Kiroff, D.C. Ohio, 1975, 399 F. Supp. 409, reversed on other grounds, 431 U.S. 968, 97 S. Ct. 2927, 53 L.Ed 2d 1064 cert. den.

The United States court has also stated that if a state court reached its decision on state grounds, it will not review those grounds. Orr v. Orr, __U.S.__, 99 S. Ct. 1102.

It is submitted that the state constitutional provisions, its procedural rules and case law are substantial and sufficient, in fact probably exceed the requirements of the United States Constitution. Therefore, the United States Supreme Court should feel no need to review as set forth in Lamb Enterprises, Inc., supra.

In additional, petitioner's original motion in arrest of judgment or new trial initially raised at the Court of Common Pleas state level raise state, not federal, grounds as set forth in his motion in

arrest of judgment or new trial, a true and correct copy of which is attached hereto and marked Commonwealth's Exhibit "A". The Pennsylvania Supreme Court has stated many times that issues not raised at the lower court will not be heard on appeal. In fact the United States Supreme Court has recognized and approved of a similar policy when it held that a failure to present federal questions in conformance with state procedure constitutes an adequate and independent ground barring review by the United States Supreme Court so long as the state has a legitimate interest in enforcing its procedural rules. Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed 2d 486 (1978). Also it has been held that petitioner could not raise

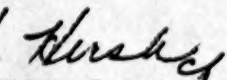
for the first time on a writ of certiorari contentions of alleged unconstitutional application where the state court had an opportunity to pass upon it. Monks v. New Jersey, 398 U.S. 71, 90 S. Ct. 1563 (1970).

For all of the above reasons, it is submitted that petitioner was afforded due process and the constitutional guarantees as set forth in the Pennsylvania Constitution. Since these state standards exceed or equal federal constitutional mandates, there is no need for this court to review the same.

Finally, in the state court, petitioner raised state grounds and not federal grounds. Therefore, it is respectfully

submitted that John LaGuardia's petition for writ of certiorari should be denied.

Respectfully submitted,



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Attorney for Respondent

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
VS	:	MERCER COUNTY, PENNSYLVANIA
JOHN J. LAGUARDIA	:	NO. 175 OF 1978 (Criminal Division)

MOTION IN ARREST OF JUDGMENT OR NEW TRIAL

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

NOW, comes the Defendant by his attorney, William M. Panella, Esq., and moves the Court for an arrest of judgment or, in the alternative, a new trial in the above entitled matter for the following reasons:

1. The verdict of the jury is contrary to the weight of the evidence.

2. The verdict of the jury finding the Defendant guilty as charged is not supported by substantial evidence.

3. By the Court's refusal of less than one (1) day's continuance, the Defendant was deprived of counsel of his choice for the full trial.

4. The Court erred in allowing the introduction of Exhibit #5 (gym bag) when there was no testimony that bag found was same bag as in Defendant's car.

5. The Court erred in allowing testimony as to Mahoning County Police officers being at Defendant's residence.

6. The Court should not have excused juror #11 and substituted juror #13, when juror #11 merely injured his eye in a minor matter.

7. In closing by Assistant District Attorney as to statements by her that the name "Willie" was not used at preliminary hearing, objections should not have been overruled as there was nothing in the evidence pertaining to this.

Commonwealth's Exhibit "A"

47A

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DISTRICT ATTORNEY

M. PANELLA
LAW
PA

8. The Court erred in overruling Defendant's objections to their charge, as follows:

a. The court should not have charged the jury that they could find the defendant guilty of conspiracy to possession of cocaine when the defendant was not indicted for such a charge.

b. The court would not clairify to the jury the charge on accomplice and it left the jury with the impression that the only defense that the defendant had was to withdraw and the court by saying " If he did not know, it would be difficult for him to withdraw.

9. The court by not waiting and continuing the trial until a witness, one Lt. Whiteside appeared by suphoena, timely filed deprived defendant of a fair trial and the opportunity and requirement that he be allowed to call any and all witnesses.

10. Over objection the court allowed Detective Allen to testify concerning certain guns found in defendant's home which were never found to be defendant's, and then when objection was made,the court in presence of the jury told defendant's counsel that they had the opportunity to call defendant's father to the stand concerning the guns, thus putting defendant in the position of calling a witness it may not desire to, and if not calling leaving the impression in the jury's mind that they had something to hide.

11. The court by these statement at sidebar that "maybe the defendant needs to be prejudiced"deprived the defendant of a trial by a fair and impartial judge.

12. The court should not have allowed Commonwealth's Supplemental Point for charge concerning defendant's right to extradation under Ohio law.

13. Rebuttal testimony concerning the search of Defendant's house should not have been allowed as there was no file kept of the search or any evidence seized.

14. The comments of the Court in their Charge would have a tendency to leave the jury with the impression that the Court favored the Commonwealth's case as opposed to the Defendant's.

Respectfully submitted,

Attorney for Defendant

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	
VS	:	MERCER COUNTY, PENNSYLVANIA
	:	
JOHN J. LAGUARDIA	:	NO. 175 OF 1978 (Criminal Division)

ORDER OF COURT

AND NOW, this _____ day of June, 1979, upon presentment of the foregoing Motion, that the same is directed to be filed and a copy thereof served upon the District Attorney of Mercer County and the stenographer is directed to transcribe all of the notes of testimony and to give notice to the counsel for the Defendant and to the District Attorney of Mercer County upon the lodging of said notes of testimony with the Prothonotary.

BY THE COURT

_____